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IN THE

Supreme Court of the United States

October Term, 1981

JOHN W. FRIEL,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STANFORD SHMUKLER
Twelfth Floor
1314 Chestnut Street
Philadelphia, Pennsylvania 19107
(215) 732-3400
Counsel for Petitioner Friel

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED

1. Where a claim for fire loss to a property in Philadelphia was being adjusted solely in Philadelphia between a Philadelphia attorney and a Philadelphia adjusting agency, can proof that a letter was mailed by the attorney from Philadelphia directly to the insurance company in Connecticut, with a carbon copy to the Philadelphia adjusting agency, support a conviction for mail fraud under 18 U. S. C. § 1341 without proof that Defendant caused the mails to be used or that he knew they would be used?

2. Where there was no evidence showing that the letter was actually received in the mails in Connecticut or that the Defendant mailed it or caused it to be mailed, and the trial court permitted the jury to find such mailing based on custom or usage which was not proved, does this support a conviction for mail fraud under 18 U. S. C. § 1341?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
1. One Mailing Cannot Support a Conviction Under § 1341 Without Proof That the Use of the Mail Was Caused by or Known by Defendant as an Essential Element of a Scheme to Defraud	7
2. A Conviction Under Section 1341 Cannot Stand Without Proof of Actual Mailing and Without Proof of Custom or Usage	9
APPENDIX A: Court of Appeals Judgment Order	A1
APPENDIX B: District Court Memorandum-Order	A3
APPENDIX C: Judgment and Probation/Commitment Order	A5
APPENDIX D: Government Exhibit 7, Letter Dated June 1, 1979	A7

TABLE OF AUTHORITIES

Cases:	Page
Bolen v. United States, 303 F. 2d 870 (9th Cir. 1962)	9
Kann v. United States, 323 U. S. 88 (1944)	7, 8
Parr v. United States, 363 U. S. 370 (1960)	7, 8
Pereira v. United States, 347 U. S. 1 (1954)	7, 8
United States v. Baker, 50 F. 2d 122 (2nd Cir. 1931)	9
United States v. Cady, 567 F. 2d 771 (8th Cir. 1977)	9
United States v. Dondich, 506 F. 2d 1009 (9th Cir. 1974)	9
United States v. Fassoulis, 445 F. 2d 13 (2nd Cir. 1971)	9
United States v. Gomez, 636 F. 2d 295 (10th Cir. 1981)	9
United States v. Joyce, 449 F. 2d 9 (7th Cir. 1974), *cert. denied*, 419 U. S. 1031 (1974)	9
United States v. Leathers, 135 F. 2d 507 (2nd Cir. 1943)	9
United States v. Maze, 414 U. S. 395 (1974)	7, 8
United States v. Sampson, 371 U. S. 75 (1962)	7, 8
United States v. Wechsler, 392 F. 2d 344 (4th Cir. 1968)	7
United States v. Ziperstein, 601 F. 2d 281 (7th Cir. 1979)	9

Statutes:	
18 U. S. C. § 1341 (Mail Fraud Statute)	i, 3, 4, 6, 7, 8, 9
28 U. S. C. § 1254(1)	2

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JOHN W. FRIEL, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on June 15, 1982.

OPINIONS BELOW

On June 15, 1982 the United States Court of Appeals for the Third Circuit entered a Judgment Order, which has not been officially reported, but is reproduced in Appendix A, *infra*, pages A1-A2, affirming the judgment of conviction and sentence entered by the United States District Court for the Eastern District of Pennsylvania on August 28, 1981. On that date, the Honorable Louis H. Pollak, Judge of that Court, had sentenced Petitioner to a term of imprisonment for three years. On August 19, 1981 Judge Pollak had filed a Memorandum Order denying Post-Trial Motions, which has not been officially reported, and which is reproduced in Appendix B, *infra*, pages A3-A4. A copy of the Judgment and Commitment Order is reproduced herein as Appendix C, *infra*, pages A5-A6.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, pages A1-A2) affirming the judgment of the District Court, was entered on June 15, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISION INVOLVED

The mail fraud statute, 18 U. S. C. § 1341, provides in pertinent part:

"§ 1341. Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Petitioner John W. Friel and Gary Richard Lance were indicted on September 17, 1980 and charged with two counts of mail fraud in violation of 18 U. S. C. § 1341. Pre-Trial Motions for suppression of tape-recorded conversations were denied, a jury was selected and the government presented evidence for more than eight days. At the close of the government's case, the trial Judge entered a judgment of acquittal as to both defendants on the second count, finding that the evidence was insufficient to go to the jury. (Appendix B, *infra*, page A-3). Defense and rebuttal evidence was presented for an additional five days, and the case was finally submitted to the jury, which found defendant Lance not guilty, but adjudged defendant Friel guilty on Count 1. Timely Post-Trial Motions were filed and on August 19, 1981 were denied by Judge Pollak. On August 28, 1981 Judge Pollak sentenced defendant Friel to imprisonment for three years. A timely appeal was filed and argued and on June 15, 1982 the Court of Appeals entered a Judgment Order affirming the conviction and sentence.

The evidence at trial showed that defendant Friel was the President and part owner of a corporation which operated a restaurant-tavern called Bramwell's, located at 200 S. Camac Street in Philadelphia, Pennsylvania. On May 7, 1979 Bramwell's and its contents were damaged by a fire, which the government claimed had been set by Friel and Lance. The government's theory was that in October, 1978 defendant had secured insurance protection of $100,000.00 for contents and $40,000.00 for business interruption. They claimed that during the next few months the company and Friel incurred heavy debts which they were unable to pay, and that defendants Friel and Lance devised a scheme to defraud the insurance

company by removing valuable items from the premises, setting fire to the premises and making claim from the insurance company for losses for paintings and antiques which had not been lost but which had been removed, for food which had not been lost or damaged, and for food which had been sold to the public through another business. In Count 1 of the indictment both defendants were charged with causing on June 1, 1979 to be delivered by the United States Post Office a Certified letter addressed to the insurance company in Hartford, Connecticut containing two proofs of loss for business interruption and loss of contents; in Count 2 they were charged with causing on August 22, 1979 to be delivered by United States Post Office a Sworn Statement in Proof of Loss for loss of contents. The evidence at trial relating to the proof of arson consisted largely of testimony of "experts", who were contradicted by defense experts, setting forth their opinion as to the incendiary nature of the fire; as well as testimony of damaging statements allegedly made by defendants. The evidence relating to the mailings was largely circumstantial. An employee of the General Adjustment Bureau, a Philadelphia company which represented the insurance company, inspected the premises on May 8, 1979, the day after the fire. He directed Friel to make an inventory of everything that was in the building on the date of the fire, to attach a value thereto, and to submit a proof of loss. A letter from Friel's attorney to the Philadelphia adjuster was the subject of Count 2, which was dismissed because of lack of evidence that it was actually mailed.

An employee of the insurance company in its Hartford office testified that he received a letter from the attorney for Mr. Friel. Although it was only a photocopy of an unsigned letter, rather than the original, and it was not in an envelope, nor was it stamped in as being re-

ceived in a mailroom, nonetheless the witness testified that he believed it had been received in the mail because usually that kind of material came in the mail. The Court admitted that testimony without any further proof of custom or usage.

It was on the basis of this testimony and letter, which was addressed to the insurance company in Hartford by an attorney for Bramwell's, referring to two proofs of loss, reflecting a carbon copy to the General Adjustment Bureau in Philadelphia, that the jury was permitted to conclude that it was mailed, since it bore a typed notation on the bottom, stating "certified mail, return receipt requested." A copy of that letter is attached hereto as Appendix D, *infra*, page A7. However, no evidence was offered that it was actually received in the mail, no return receipt was produced, no postal records were introduced to show that it was delivered by certified mail, nor was the attorney called to testify as to whether he had actually placed it in the mail.

As already noted, the jury found defendant Friel guilty, but found defendant Lance not guilty. In ruling on Post-Trial Motions, the trial Judge concluded that a reasonable jury could conclude that the letter and its enclosure were sent through the mails (Appendix B, *infra*, page A4). The Court of Appeals, in affirming the judgment, rejected the contention that the District Court had erred in denying a Motion for Judgment of Acquittal in that Appellee had failed to prove a violation of § 1341 (Appendix A, *infra*, p. A1). However, neither Court addressed the question of whether the conviction could be sustained under this statute without proof that defendant caused the mails to be used or knew that they would be used.

REASONS FOR GRANTING THE WRIT

1. One Mailing Cannot Support a Conviction Under § 1341 Without Proof That the Use of the Mail Was Caused by or Known by Defendant as an Essential Element of a Scheme to Defraud.

The mail fraud statute provides that whoever knowingly causes to be delivered by mail any matter for the purposes of executing a scheme to defraud is guilty of a crime. In *United States v. Maze*, 414 U. S. 395 (1974), *United States v. Sampson*, 371 U. S. 75 (1962), *Parr v. United States*, 363 U. S. 370 (1960), *Pereira v. United States*, 347 U. S. 1 (1954), and *Kann v. United States*, 323 U. S. 88 (1944), this Court discussed the scope of the mail fraud statutes and tried to establish guidelines as to what constitutes a knowing use of the mails within the meaning of the statute. In *Maze*, the Court quoted *Kann* as requiring that the mailing must be "for the purpose of executing the scheme, as the statute requires," but "it is not necessary that the scheme contemplates the use of the mails as an essential element," citing *Pereira*. The Court analyzed *Parr* as requiring a sufficient connection between the mailing and the execution of the scheme to fall within the statute. In *Parr* and *Kann*, this Court enunciated the proposition that the mere concurrence of a violation of the general purpose which the mail fraud statute is designed to serve and a use of interstate facilities does not make an act, even though morally reprehensible and violative of state law, into a federal crime. See *United States v. Wechsler*, 392 F. 2d 344, 352 (4th Cir. 1968).

However, in the case at bar, the question is whether the statute as interpreted by this Court encompasses a situation where a Connecticut Insurance Company, which utilizes a Philadelphia adjustment agency to conduct per-

sonal negotiation to settle a claim arising out of a Philadelphia fire, falls within the mail fraud Act merely because counsel sends one letter in the mail directly to the Connecticut insurance company, even though the evidence does not show that the defendant authorized his attorney to send that letter in the mail, that he knew that it would be sent in the mail, or that he could reasonably have contemplated that it would be sent in the mail.[1] In other words, there is little doubt that the letter, containing the proofs of loss, was essential to the insurance claim, and if the claim was fraudulent, then it could be considered an essential part of the fraud; however, does the mere incidental use of the mails render it an essential part of the scheme within the requirements of *Pereira* and *Sampson*, or does it lack a sufficient connection between the mailing and the execution of the scheme, as set forth in *Kann*, *Parr* and *Maze*, to bring it within the statute. Neither the Trial Court nor the Court of Appeals here passed on the issue of whether a single uncontemplated mailing falls within the statute. Only this Court can definitively establish the outer limits and scope of the statute for the guidance of federal courts throughout the country.

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1. In fact, since the evidence demonstrates that all the negotiations took place solely in Philadelphia, and that was the reason the insurance company utilized a local adjusting bureau, it appears that the mailing here was an uncontemplated aberration.

2. A Conviction Under Section 1341 Cannot Stand Without Proof of Actual Mailing and Without Proof of Custom or Usage.

There have been many appellate decisions, besides those decisions of this Court cited in the first point above, which establish the principle that the knowing use of the mails for the purpose of the alleged crime is an essential element of the offense. These cases point out clearly that the government must prove beyond a reasonable doubt that the defendant used, or caused to be used, the postal service. See, *e.g.*, *United States v. Dondich*, 506 F. 2d 1009, 1010 (9th Cir. 1974), citing *Bolen v. United States*, 303 F. 2d 870 (9th Cir. 1962). However, many of these Circuit Courts differ in their conclusion as to whether there must be actual proof of mailing, or whether testimony of ordinary mailing practices, constituting evidence of custom and usage, will suffice within the statute. Cases arising in the Second, Seventh and Ninth Circuits have held that such evidence is not sufficient. See *United States v. Baker*, 50 F. 2d 122 (2nd Cir. 1931); *United States v. Joyce*, 449 F. 2d 9 (7th Cir. 1974), *cert. denied*, 419 U. S. 1031 (1974); and *United States v. Dondich*, *supra* (9th Cir. 1974). On the other hand, cases in the Eighth and Tenth Circuits, as well as other cases in the Second and Seventh Circuits, arrive at contrary conclusions. See *United States v. Cady*, 567 F. 2d 771 (8th Cir. 1977); *United States v. Gomez*, 636 F. 2d 295 (10th Cir. 1981); *cf. United States v. Ziperstein*, 601 F. 2d 281 (7th Cir. 1979), *United States v. Fassoulis*, 445 F. 2d 13 (2nd Cir. 1971), and *United States v. Leathers*, 135 F. 2d 507 (2nd Cir. 1943).

In the case at bar, as already noted, the testimony showed that the Connecticut insurance company utilized the services of a Philadelphia adjusting agency to nego-

tiate directly and personally with counsel for defendant over the loss which occurred in Philadelphia. Most of the transactions were carried on in person. In fact, it was this set of facts which led the Trial Judge to grant a judgment of acquittal on Count 2, which dealt with a letter addressed to the adjustment bureau in Philadelphia, since he could not be sure that it was sent in the mails, and it could have been hand delivered. The first Count, however, dealt with a letter which was addressed to the insurance company in Connecticut, reflecting a carbon copy to the adjustment bureau in Philadelphia, and bore a notation that it was to go by certified mail, return receipt requested. Although there was no evidence offered that it was actually received in the mail by the company in Connecticut, no return receipt was produced, no postal records were introduced to show that it had been delivered by certified mail, the attorney who wrote it was not called to testify as to whether he or his secretary actually placed it in the mail, the trial Judge allowed the jury to find that it was sent in the mail simply because the insurance company representative said that usually this kind of material came in the mail. Whether or not that was a permissible inference for the jury to draw was a question raised on Post-Trial Motions, and the trial Judge ruled that it was a proper inference. The Court of Appeals apparently agreed, since it affirmed. However, even assuming this to be so, neither Court addressed the question of whether the mailing of one letter would bring this transaction within the meaning of the mail fraud statute, without proof that defendant actually caused the letter to be mailed as an essential part of the scheme, or knew or reasonably contemplated that it would be mailed. Furthermore, the Court permitted the jury to find that there was circumstantial evidence of mailing from the

mere statement by the witness that it usually occurred this way, without any proof that there was such a custom or usage. The Court of Appeals seems to have approved this procedure, although this is not clearly spelled out in its Opinion. This apparently brings this Circuit in line with some of the decisions referred to above, but puts them in conflict with the decisions in the Second, Seventh and Ninth Circuits, as cited above. Only a decision by this Court can resolve this conflict.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted as to both of the questions presented herein.

Respectfully submitted,

STANFORD SHMUKLER
Counsel for Petitioner